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No. 04-1421

Supreme Court, U.S.
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In The
Supreme Court of the United States

RODRICK LeGRAND,

Petitioner,

v.

AREA RESOURCES FOR COMMUNITY AND HUMAN SERVICES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITIONER'S QUESTION PRESENTED FOR REVIEW

The Question Presented by Petitioner does not accurately reflect the issue in this case. Specifically, Petitioner overstates the issue in hopes of creating some reason for this Court to grant review. Concisely stated, the only issue properly raised in this case is as follows:

Whether three (3) isolated invitations for a relationship over a nine (9) month period with eight (8) months between the first and second incidents is sufficient to state a cause of action for hostile work environment harassment, particularly where the alleged harasser was not an employee of the organization and did not have frequent contact with the Petitioner.

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STATEMENT OF THE CASE

Petitioner Rodrick LeGrand ("LeGrand") brought a claim against Respondent Area Resources for Community and Human Services ("ARCHS") on May 3, 2002. LeGrand alleged two counts of sexual harassment, one claim for *quid pro quo* harassment and one claim for hostile work environment.

LeGrand was employed by ARCHS as a neighborhood facilitator. In that capacity, LeGrand worked with residents and community leaders to facilitate a planning process for development of the community, entitled the Sustainable Neighborhood Initiative.

Father Maurice Nutt, the alleged harasser, was neither employed by ARCHS nor was he LeGrand's supervisor. Father Nutt was a member of the Board of Directors of ARCHS and a co-chair of the Sustainable Neighborhood Initiative. As a Board member of ARCHS and a co-chair of the Sustainable Neighborhood Initiative, Father Nutt had no authority over LeGrand, or over any of LeGrand's supervisors.

LeGrand alleged in his lawsuit just three separate incidents over a span of nine (9) months to support his claim of hostile work environment: 1) on or about March 22, 2001, Father Nutt invited LeGrand to watch pornographic movies with him and talked with LeGrand about relieving stress through masturbation; LeGrand declined Father Nutt's offer and did not have any unusual contact with Father Nutt for a long period of time; 2) almost eight months later, LeGrand alleges that at the end of November 2001, Father Nutt mentioned the pornographic videos again, kissed LeGrand on the lips and touched his rear; and 3) in December 2001, Father Nutt briefly touched

LeGrand on the thigh during a meeting with three other individuals present. LeGrand admits that after solicitation from his immediate supervisors, he revealed what allegedly occurred regarding the first event and that his supervisors took prompt remedial action. LeGrand also admits that the alleged incidents stopped for nearly eight months following his supervisors' advice.

The second incident allegedly occurred in late November or early December. Father Nutt kissed LeGrand after a hug. According to Father Nutt, the brief kiss with LeGrand was entirely welcome and LeGrand did not object. LeGrand alleges that Father Nutt also touched his backside, and invited him to watch pornographic movies again, which Father Nutt denies.

The third incident alleged by LeGrand involved only a brief touch on LeGrand's thigh that occurred in a conference room with three other individuals present and was not accompanied by any sexual comments. LeGrand testified that he "moved [Father Nutt's hand] very quickly." Petitioner's App. at 16a. LeGrand contacted his supervisors each time an incident occurred and he only made four reports, with two of the reports concerning the single March, 2001 incident.

More specifically, LeGrand reported Father Nutt's conduct to his supervisors, Lisa Potts and Lucille Walton, on four dates – April 2, 2001, April 18, 2001, November 19, 2001, and December 10, 2001.

During April of 2001, Ms. Potts and Ms. Walton provided the following suggestions to remedy LeGrand's Complaint:

- Told LeGrand to avoid further contact with Father Nutt;
- Told LeGrand to seek counseling with EAP;
- Offered reassignment to a different neighborhood so that contact with Father Nutt would be limited (because Father Nutt's parish was located in LeGrand's neighborhood);
- Suggested that one of LeGrand's co-chairs attend meetings with LeGrand;
- Offered to attend meetings with LeGrand themselves; and
- Offered to move LeGrand's office from the community to ARCHS' offices a few miles away.

After receiving the advice from his supervisors, LeGrand admitted that indeed he was able to avoid contact with Father Nutt following the March 22, 2001 alleged incident, as evidenced by the fact that no alleged acts of harassment occurred for eight (8) months after LeGrand was counseled by his supervisors. Father Nutt also confirmed that LeGrand avoided contact with him.

LeGrand's job responsibilities did not require him to meet with Father Nutt. Petitioner's App. at 15a. LeGrand admits that Ms. Potts and Ms. Walton laid out a plan with him following his first complaint, as outlined above. LeGrand also admits that Ms. Potts and Ms. Walton offered to move his office from the neighborhood in which he was working to ARCHS' office in a different neighborhood. A move to a different neighborhood would have eliminated LeGrand's contact with Father Nutt based on the fact that Father Nutt's church would not be located in

that neighborhood. LeGrand failed to move his office to ARCHS' location away from Father Nutt's parish.

After LeGrand complained about Father Nutt's conduct again in December 2001 and contemporaneous with his charge of discrimination, ARCHS conducted formal investigation. As a result of the investigation, ARCHS determined that Father Nutt may have violated ARCHS' rather strict sexual harassment policy and requested the resignation of Father Nutt from the Board of Directors through correspondence with his attorney, Frank Kaveney. Father Nutt complied with the request and resigned in February 2002. Petitioner's App. at 17a.

During LeGrand's employment with ARCHS and specifically during the time of the alleged incidents of harassment, from March-December 2001, LeGrand did not incur an increased number of absences. Petitioner's App. at 17a. He did, however, voluntarily take vacation days from work on March 26-31, July 20, August 2-3, August 6-10 and August 17, 2001. LeGrand took vacation days in August to travel to Washington D.C. to attend a workshop for a democracy organization. Petitioner's App. at 17a.

LeGrand also engaged in leisure activities during the alleged period of harassment, including traveling to Kansas City in the Fall of 2001 to attend a college football game with a fraternity brother. LeGrand was never otherwise absent from work until he voluntarily took medical leave in January 2002 (after he had already filed a charge of discrimination with the Equal Employment Opportunity Commission), nearly ten months after the first alleged incident of harassment and one month after the last of the three incidents.

LeGrand's medical leave also followed his filing of the charge of discrimination. In addition, LeGrand sought medical treatment from a new primary care physician and counseling from a new private therapist (apart from the limited counseling with an EAP counselor) only after he filed his charge of discrimination and took medical leave.

LeGrand was never disciplined in any manner during his employment with ARCHS. He never received a demotion or any reductions in pay. Petitioner's App. at 20a. However, when LeGrand was on medical leave, ARCHS eliminated all the positions of Neighborhood Facilitator in the organization, including LeGrand's position, due to a reduction in financial resources. ARCHS then offered LeGrand a comparable position, which LeGrand declined stating that he was earning more money at a new job.

As a Board Member of ARCHS, Father Nutt consulted and advised Ms. Potts and Ms. Walton, but did not have any authority to make recommendations on employment matters. Petitioner's App. at 3a, 14a-15a. The structure of ARCHS and the Sustainable Neighborhood Initiative (LeGrand's focus) did not provide Father Nutt the opportunity to evaluate LeGrand's performance and Father Nutt had no direct authority over LeGrand's employment.

LeGrand filed this lawsuit in the United States District Court for the Eastern District of Missouri, alleging *quid pro quo* sexual harassment and same-sex workplace hostile environment sexual harassment. The District Court granted ARCHS' motion for summary judgment. The District Court found that LeGrand's *quid pro quo* sexual harassment claim involved nothing more than unfulfilled threats and lacked any detrimental employment action as a result of LeGrand's failure to submit to

Father Nutt's alleged sexual overtures. Petitioner's App. at 19a.

LeGrand filed an appeal with the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit").[1] The Eighth Circuit affirmed the District Court's decision. The Eight Circuit held Father Nutt's behavior, although boorish and uncivil, did not rise to the level of actionable hostile work environment sexual harassment. More specifically, the Court held that the three incidents over a nine month period were not so severe or pervasive as to alter LeGrand's work environment:

> There can be no doubt Father Nutt's actions, admitted and alleged, ranged from crass to churlish and were manifestly inappropriate; however, the **three isolated incidents, which occurred over a nine-month period, were not so severe or pervasive as to poison LeGrand's work environment**.

(emphasis supplied); Petitioner's App. at 9a. Accordingly, the Eighth Circuit found that LeGrand failed to establish the existence of a trial-worthy question of fact on his hostile work environment claim.

This Court should deny LeGrand's petition for a writ of certiorari. The Eighth Circuit and the District Court properly dismissed LeGrand's claim. In addition, LeGrand's petition does not raise important issues for this Court, which has issued several recent opinions on sexual

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[1] On appeal to the Eighth Circuit, Petitioner abandoned his *quid pro quo* claim and only sought to appeal the District Court's order dismissing his same-sex hostile work environment sexual harassment claim.

harassment, or otherwise set forth compelling reasons warranting grant of a writ of certiorari. If accepted for review, this case would involve matters relevant and applicable only to the parties in this case. Therefore, LeGrand's petition should be denied.

SUMMARY OF THE ARGUMENT

This Court should deny LeGrand's petition for a writ of certiorari. The Eighth Circuit properly held that three isolated incidents over the course of nine-months, with an eight-month span of time between the first and second incidents, were not sufficiently severe or pervasive to alter LeGrand's working environment so as to constitute a hostile work environment.

In addition, LeGrand has not demonstrated a split in the circuits, nor has he demonstrated that the Eighth Circuit and the Circuit Court of Appeals in general have articulated and applied an improper standard in sexual harassment cases. LeGrand's petition simply does not set forth sufficient grounds or compelling reasons to grant a writ of certiorari. If accepted for review, the case would involve matters applicable and relevant only to the parties in this case. Accordingly, LeGrand's petition should be dismissed.

REASONS FOR DENYING PETITION FOR A WRIT OF CERTIORARI

I. THE PETITIONER HAS FAILED TO ESTABLISH SUFFICIENT GROUNDS FOR CERTIORARI UNDER THE SUPREME COURT'S RULES.

LeGrand's petition for a writ of certiorari should be denied because LeGrand has not asserted sufficient grounds to justify review by this Court. Supreme Court Rule 10 states that this Court will grant a writ of certiorari "only for compelling reasons," and sets out such circumstances. Not only has LeGrand failed to identify any such circumstances in support of his request for certiorari, he has also failed to set forth any compelling reasons that militate in favor of the granting of certiorari.

The legal basis upon which LeGrand seeks review is, surprisingly, not at all clear from LeGrand's Petition. LeGrand appears to argue that the Eighth Circuit, despite citing to this Court's precedent on defining hostile work environment harassment, incorrectly determined that the alleged actions of Father Nutt were not sufficiently severe or pervasive to alter LeGrand's conditions of employment and did not create a hostile work environment. As is clear in the Supreme Court's Rules, a "petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Rather than create a new standard, the Eighth Circuit simply applied the stated rule of law previously established by this Court.[2] Petitioner has not cited to any

[2] Petitioner appears to seize on a comment in the last paragraph of the Eighth Circuit's opinion (see Appendix A at 9a) and infer that the Eighth Circuit has somehow added a requirement that hostile work environment harassment must be physically violent or overtly

(Continued on following page)

clear split among the Circuits. Finally, the Circuit Courts of Appeal in general have not distorted what this Court has articulated as "severe or pervasive" under Title VII's sexual harassment hostile work environment component.

This case presents none of the bases for review suggested in Rule 10. While the reasons cited in the rule are not exhaustive, the Court should "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeals." *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387 (1923).

LeGrand does not assert that the decision in this case creates the sort of conflict confusion suggested in Rule 10. He simply states that the Eighth Circuit erred and that despite its use of the *Faragher* test, it has somehow misapplied this Court's guidance in hostile work environment sexual harassment cases. This Court has ruled often and recently on hostile work environment

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threatening to be actionable. This is simply not the case and severely overstates the Eighth's Circuit's test, which simply follows well-settled, and very recent, precedent of this Court. In fact, the Eighth Circuit opinion merely references, in passing, that the alleged harassment was neither physically violent nor overtly threatening. The opinion does not hold that conduct would need to be physically violent or overtly threatening to rise to the level of being actionable. The Eighth Circuit's opinion is no different than that of this Court in *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998), which held that "Isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."

sexual harassment cases and additional guidance over this case would not be instructive to the public.

A. The Eighth Circuit Correctly Determined That The Alleged Actions Of Father Nutt Were Not Sufficiently Severe Or Pervasive To Alter Legrand's Conditions Of Employment And Did Not Create A Hostile Work Environment.

The Eighth Circuit correctly determined that the alleged actions of Father Nutt were not sufficiently severe or pervasive to alter LeGrand's conditions of employment and did not create a hostile work environment. LeGrand's petition for a writ of certiorari merely disputes the Eighth Circuit's ruling regarding whether the actions of Father Nutt were sufficiently severe or pervasive to alter LeGrand's working conditions, thus, creating a hostile work environment. To support his belief, LeGrand draws comparisons to the actions that occurred in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems Inc.*, 510 U.S. 17 (1993); and *Carrero v. New York City Housing Auth.*, 890 F.2d 569 (2nd Cir. 1986). The alleged conduct in these cases, committed by direct supervisors with daily contact with their victims, was, however, far more egregious than the contact involved in the instant case.

The facts LeGrand alleges constitute a hostile work environment consists of three, admittedly isolated, incidents with Father Nutt spread out over nine (9) months. The first alleged incident occurred in March of 2001. LeGrand alleges that Father Nutt asked LeGrand if he would like to watch pornographic videos and talked to him about relieving stress through masturbation. Petitioner's App. at 3a and 15a. Plaintiff rejected Father Nutt's

request. As a result, Father Nutt stopped asking LeGrand for eight months. LeGrand's supervisors provided him with steps on how to remedy the situation. The advice of LeGrand's supervisors was effective, because LeGrand had no further issues with Father Nutt until almost eight (8) months later – in November. Petitioner's App. at 3a, 4a, and 16a.

In November, LeGrand was approached again by Father Nutt. Father Nutt allegedly mentioned the pornographic videos again, kissed LeGrand on the lips and touched his rear. The final alleged incident occurred in December, 2001. Father Nutt allegedly touched LeGrand's thigh during a meeting with three other individuals present. Petitioner's App. at 16a.

In contrast, in *Meritor v. Vinson,* the plaintiff alleged that her **immediate supervisor** sexually harassed her for **four** years. During those four years, plaintiff's supervisor made repeated demands for sexual favors, during and after business hours. She also estimated that her supervisor made her have sex with him 40 to 50 times over a four year span. The plaintiff was also fondled in front of other employees, was followed into the restroom when she went alone, and the supervisor exposed himself and even forcibly raped her several times during the same four year span. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 60.

To compare *Harris*, a case involving rape and daily harassing conduct to a case (*LeGrand*) involving only three isolated incidents, by a non-supervisor, spread out over nine months is, at best, illogical. Likewise, in *Harris*, the Plaintiff alleged that that the president of the company, over the course of two (2) years insulted the plaintiff because of her gender, stating that "[Y]ou're a woman

what do you know," "[W]e need a man as the rental manager (the plaintiff's position)," and called her a "dumb ass woman." *Harris* at 19. The alleged harasser also suggested, in front of other co-workers, that the two of them go back to a hotel to negotiate her raise. He would also repeatedly ask Plaintiff to get coins out of his front pockets, and would throw objects to the ground and ask the plaintiff to pick them up. In addition, the alleged harasser made sexual innuendos regarding the plaintiff's clothing, and while the plaintiff was trying to arrange a deal for a customer of the company, asked her in front of other co-workers, "What did you do, promise the guy . . . some [sex] Saturday night?" This alleged activity occurred repeatedly over the span of two years. Again, the conduct in *Harris* is much more egregious than that alleged by Petitioner LeGrand.

In *Carrero v. New York City Housing Authority*, the plaintiff alleged that over the course of two (2) weeks her direct supervisor sexually harassed her. During this two-week period, the alleged harasser touched plaintiff's knee and arm on several occasions, kissed plaintiff on her neck and attempted to kiss her on at least two more occasions all in the course of 14 days. The alleged harasser told the plaintiff that he would fail her on her next probationary report if she did not succumb to his advances. He also repeatedly publicly criticized the plaintiff after she rebuffed his advances. Eventually, the alleged harasser even had the plaintiff demoted.

Each of the plaintiffs in *Meritor, Harris*, and *Carrero* all suffered multiple sexual advances and sexual contact on a regular (if not daily) basis from either their immediate supervisor or the president of the company. Clearly, the alleged acts in those cases are more egregious than

LeGrand, where he was only subjected to three acts in nine months, with an eight (8) month span between the first and second incidents. As evidence of the fact that Father Nutt's conduct was less severe or pervasive than the conduct in *Meritor*, *Harris* and *Carrero*, Petitioner LeGrand not only successfully declined Father Nutt's request to watch pornographic videos, but LeGrand's March, 2001 rejection apparently scared Father Nutt away for eight months. Furthermore, LeGrand did not have to meet with Father Nutt (who was neither an ARCHS' employee nor LeGrand's supervisor) as a condition of his employment and did not see him or have contact with him on a regular basis. Finally, Father Nutt was not even in a position to affect Plaintiff's employment. The Eighth Circuit did not err in finding that the actions of Father Nutt were not sufficiently severe or pervasive to alter LeGrand's work environment and create a hostile working environment.

Moreover, contrary to LeGrand's suggestions, Father Nutt was not capable of permeating the environment with offensive and overly sexual words and deeds, given that there was no requirement that LeGrand meet with Father Nutt and LeGrand did not interact with Father Nutt on a consistent or regular basis. Finally, LeGrand's statement that Father Nutt created a hostile work environment because he commented that LeGrand's advancement in the company could have been improved by a relationship with Father Nutt simply does not match the evidence of record. LeGrand was aware that Father Nutt did not have authority or the ability to make employment decisions regarding LeGrand. Obviously, LeGrand was aware Father Nutt had no authority to affect his employment because nothing happened during the eight months in

between Father Nutt's first and second incidents. LeGrand was not the victim of any adverse employment decisions when he rebuffed Father Nutt's earlier advances. Father Nutt's advances amounted to no more than what the Eighth Circuit correctly pointed out as unfulfilled threats by an individual not even employed by the organization.

LeGrand's citation to *Meritor*, *Harris*, and *Carrero*, do nothing but support the Eighth Circuit's opinion. The alleged actions in *Meritor*, *Harris*, and *Carrero* were all more egregious in that the alleged harasser was a person with supervisory authority over the plaintiff, had daily contact with the plaintiff, and whose misconduct ranged from rape to eight counts of touching over just a two week period.

B. This Case Does Not Involve A Split Of Authority Among The Circuits.

This case does not involve a split among the circuits. Under Supreme Court Rule 10, certiorari may be considered where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

The type of conflict required between the circuit courts to warrant the grant of certiorari is a direct conflict regarding specific issues of law. *See, e.g.*, *Jaffe v. Redmond*, 518 U.S. 1 (1996) (certiorari granted to resolve conflict between several Circuits regarding whether federal courts should recognize a psychotherapist-patient privilege under the Federal Rules of Evidence); *Bingler v. Johnson*, 394 U.S. 741, 747-748 (1969) (certiorari granted to resolve conflict between Third Circuit's ruling and

ruling by the Fifth Circuit regarding validity of a treasury regulation); *United States v. O'Malley*, 383 U.S. 627, 630-631 (1966) (certiorari granted to resolve conflict between Seventh Circuit's decision and a previous ruling by the First Circuit regarding whether to exclude from a taxable estate the portion of the trust principal representing accumulated income and order an appropriate refund); *Braxton v. United States*, 500 U.S. 344, 347 (1991) (certiorari granted to resolve conflict between the Fourth Circuit's decision below and that of the Second and Fifth Circuits regarding whether a "stipulation" in a plea agreement must be part of the "quid pro quo" for the government's agreement not to charge a higher offense).

This case simply does not present any decision by the Eighth Circuit that is in direct (or even indirect) conflict with any other circuit on the specific issues. In fact, LeGrand concedes later in his brief that the conflict is not among the Circuits, but is, instead, a "conflict" (albeit erroneous) between the Circuit Courts of Appeal and the Supreme Court. By making this admission, Petitioner implicitly concedes that the asserted error is simply a "misapplication of a properly stated rule of law," which, this Court's rules specifically state, should "rarely" serve as a basis for a writ of certiorari. Supreme Court Rule 10.

C. Even If There Were A Split In The Circuit Courts Of Appeal, The Eighth Circuit Articulated And Applied The Proper Standard.

The Eight Circuit articulated and applied the proper standard in this case. The Eighth Circuit stated that in order to establish a *prima facie* case of hostile work environment sexual harassment, LeGrand "must prove (1) he is a member of a protected group, (2) he was subjected

to unwelcome harassment, (3) the harassment was based on sex, and (4) the harassment affected a term, condition, or privilege of his employment." Petitioner's App. at 22a. The Eighth Circuit held that in order to meet the fourth element, LeGrand had to "demonstrate the unwelcome harassment was sufficiently severe or pervasive as to affect a term, condition, or privilege of employment by creating an objectively hostile or abusive environment. *Id.* The Eighth Circuit went on to say "LeGrand must prove his workplace was 'permeated with discriminatory intimidation, ridicule, and insult.'" This exact framework has been repeatedly articulated by this Court. *See, e.g., Harris* at 21. In making this determination, the Eighth Circuit further stated that it considered the "totality of the circumstances." Petitioner's App. at 7a. When considering the totality of the circumstances, the Eighth Circuit noted that it would examine "a number of factors, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employees' work performance.'" *Id.* The Eighth Circuit obviously followed this Court's guidelines as set out in *Harris*, where this Court stated:

> But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee's work performance."

Harris at 23. LeGrand cannot demonstrate that the Eighth Circuit applied an improper standard.

D. There Is No Conflict Between The Circuit Courts Of Appeal And This Court.

There is no conflict between the Circuit Courts of Appeal and this Court. LeGrand argues that because the Eighth Circuit and other appellate courts have stated in opinions that "more than a few isolated incidents are required" in order to prove sexual harassment, there is a conflict between the Circuit Courts of Appeal and this Court. Again, this Court has ruled on sexual harassment cases often and recently, and has never articulated that the Circuit Courts of Appeal were misapplying the standards set by this Court.

In a futile attempt to bolster his baseless claim of a conflict between the Circuit Courts of Appeal and this Court, LeGrand argues that according to the Circuit Courts of Appeal, a single occurrence of rape would not constitute sexual harassment. First, LeGrand has not alleged that he was raped and has not alleged that any particular act of Father Nutt was sufficiently severe or pervasive to constitute actionable sexual harassment. Second, the Eighth Circuit in this case reviewed the "totality of the circumstances" and not just each isolated incident. Petitioner's App. at 7a. Finally, LeGrand provides no citation to any cases that have held a single incident of rape would not constitute actionable sexual harassment under Title VII.

Even if there were a conflict between the Circuit Courts of Appeal and this Court regarding whether one isolated incident is sufficient to constitute sexual harassment, which there is not, it still does not affect the dismissal of LeGrand's claim. LeGrand has alleged only three isolated incidents of harassment. Petitioner's App. at 3a,

4a, 9a, 15a, and 16a. The Eighth Circuit took the totality of those three instances and correctly determined that even as a group, Father Nutt's alleged actions were insufficient to alter LeGrand's working environment, as would be necessary to create a sexually hostile working environment. Petitioner's App. at 9a. Even if there were a conflict between the Circuit Courts of Appeal and this Court, it would still not affect the dismissal of LeGrand's claims.

CONCLUSION

LeGrand's claims against ARCHS have been fully examined and dismissed. LeGrand should not be able to argue simply that he disagrees with the Eighth Circuit's finding that the actions of Father Nutt were insufficient to constitute actionable sexual harassment, without citing to some error. LeGrand has failed to articulate any reason why this Court should grant his petition for a writ of certiorari. ARCHS respectfully requests, therefore, that this Court deny LeGrand's petition.

Respectfully submitted,

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REPLY TO BRIEF IN OPPOSITION

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I. INTRODUCTION

Respondent urges that LeGrand has merely argued that the Eighth Circuit misapplied this Court's test for determining whether LeGrand suffered actionable sexual harassment. This is not a case where the lower court simply misapplied a properly stated rule of law. The court below went beyond this Court's decisions and defined a new standard for determining whether conduct is "sufficiently severe or pervasive" for purposes of a Title VII hostile work environment claim. Simply put, the opinion below is wrong in light of this Court's precedent.

The Eighth Circuit departed from this Court's sexual harassment jurisprudence and applied a new, more stringent test in which it held that "more than a few isolated incidents are required" and that incidents must be so intimidating, offensive or hostile as to "poison" the work environment. Petitioner's App. at 7a. The Eighth Circuit admitted as much when it concluded that LeGrand failed to allege an actionable sexual harassment claim as a matter of law:

> Viewing LeGrand's claim *in light of the demanding standard set by the Supreme Court and by Duncan and its progeny,* Father Nutt's behavior did not rise to the level of actionable hostile work environment sexual harassment."

Petitioner's App. at 9a (emphasis added). This admission is significant. The Eighth Circuit clearly did not limit its analysis of LeGrand's sexual harassment claim to the standard set by this Court. Instead, it went beyond this Court's precedent and also viewed LeGrand's claim in light of another standard based on "*Duncan* and its progeny," a series of Eighth Circuit harassment cases.[1] As such, the decision warrants review pursuant to Supreme Court Rule 10(c), because the Eighth Circuit applied a legal standard that conflicts with relevant hostile work environment decisions of this Court.

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[1] These cases were aptly described as a "parade of horribles" in *Ricklefs v. Orman,* 2003 U.S. Dist. LEXIS 22978 at *32 (N. D. Iowa 2003).

II. ARGUMENT

A. The Decision Below is a Sweeping Circumvention of this Court's Sexual Harassment Jurisprudence.

This Court has clearly stated that conduct must be sufficiently "severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 67 (1986) (brackets in original). "Extremely serious" isolated incidents may amount to discriminatory changes in the terms and conditions of employment. *See Faragher v. City of Boca Raton,* 524 U.S. 775, 788 (1998). The Eighth Circuit has not been faithful to this Court's sexual harassment jurisprudence and has created a new test in which "[m]ore than a few isolated incidents are required," apparently regardless of whether or not those incidents are extremely serious. Petitioner's App. at 7a.

B. A Few Severe Incidents Can Sustain an Actionable Title VII Hostile Environment Sexual Harassment Claim

Under the new but not improved Eighth Circuit test, the following conduct was deemed not sufficiently severe or threatening to establish a hostile work environment: (1) Father Nutt asked LeGrand to watch pornographic movies and masturbate together to relieve stress; (2) Father Nutt suggested LeGrand would advance within the company if LeGrand watched the movies and performed sex acts on Father Nutt; (3) Father Nutt admittedly hugged and kissed LeGrand on the mouth; (4) Father Nutt admittedly brushed LeGrand's crotch with the back of Father Nutt's hand because he thought LeGrand was stimulated by the hug; (5) Father Nutt grabbed LeGrand's buttocks; and (6) Father Nutt gripped LeGrand's thigh under the conference table at a meeting. Petitioner's App. at 3a-4a, 15a-16a.

Respondent's Brief wholly ignores that Father Nutt admitted to "brush[ing LeGrand's] crotch with the back of my hand [, . . .b]ecause it seemed that [LeGrand] was stimulated by the hug." Petitioner's App. at 4a, 16a. Respondent offers a sanitized version

of this incident, stating that Father Nutt merely "touched" LeGrand's "rear" or "backside." Respondent's Brief at 1, 2, 11. This omission is significant. There is no getting around the fact that Father Nutt admitted to touching LeGrand's genitals in an intentionally sexual way.

Ultimately, it is more troubling that the court below considered the admitted genital touching and still found as a matter of law that such conduct, standing alone or coupled with an admitted kiss on the mouth and other allegations of sexual advances, was not serious enough to establish a prima facie hostile work environment claim. This Court specifically recognized *Carrero v. New York City Housing Auth.*, 890 F.2d 569 (2nd Cir. 1986) as a case involving conduct extreme enough to amount to a change in the terms and conditions of employment. *Faragher*, 524 U.S. at 788. The plaintiff in *Carrero* claimed that her direct supervisor touched her knee and arm, kissed her neck, attempted to kiss her on the lips, and told her he planned to fail her on her probationary report. *See Carrero v. New York City Housing Auth.*, 890 F.2d 569, 573, 578 (2nd Cir. 1986).

The physical conduct alleged in *Carrero* is certainly less severe than that which admittedly occurred between LeGrand and Father Nutt. The harasser in *Carrero* did not actually kissing the plaintiff on the lips or brushing her genitals with the back of his hand. Given that the *Carrero* facts are less severe than those admitted in *LeGrand*, the hostile environment claim in *Carrero* would fail under the Eighth Circuit's new test, despite this Court's recognition that *Carrero* "heeded [its] view" regarding conduct extreme enough to amount to a change in the terms and conditions of employment. *See Faragher*, 524 U.S. at 788.

C. The Harasser's Status is Relevant in Analyzing the Severity of the Harassment.

This Court has recognized that harassment by a supervisor or successively higher official or manager differs from co-worker harassment when determining employer liability. *See Burlington*

Indus. v. Ellerth, 524 U.S. 742, 747-48 (1998). Employers are vicariously liable for supervisor harassment that results in a tangible employment action. *Id.* at 761-62. While the impact of the agency relationship may be "less obvious" in cases where no tangible employment action occurred, it is still worth examining whether a supervisor harasser is aided by the agency relationship in the commission of harassment when determining whether the harassment itself is actionable. *See Ellerth,* 524 U.S. at 763; *Steck v. Francis,* 365 F. Supp. 2d 951, 971 (N. D. Iowa 2005).

The Seventh Circuit Court of Appeals has specifically held that a supervisor's use of racial epithets has a more severe impact on the work environment than a co-worker's use of such harassing words. *Dandy v. UPS,* 388 F.3d 263, 271 (7th Cir. 2004). The New Jersey Supreme Court extended this reasoning to sexual harassment cases and recognized that racial and sexual harassment by a supervisor has more severe impact than similar harassment by a co-worker. *Taylor v. Metzger,* 152 N.J. 490, 706 A.2d 685, 692 (N. J. 1998). The United States District Court for the Northern District of Iowa agreed that a supervisor's status should be considered when analyzing the severity and nature of the harassment in *Steck v. Francis,* 365 F. Supp. 2d 951 (N. D. Iowa 2005):

> When the harasser is a supervisor, the impact of the harassment is heightened: Harassment by a supervisor appears to carry the weight and imprimatur of the employer's authority and seems to authorize or condone like conduct by subordinates, thereby fostering a perception that the environment as a whole is hostile. Moreover, as the supervisor harasser is further removed from daily contact with the victim or as the supervisor harasser rises in the hierarchy, harassing incidents may become the most salient feature of the relationship between the harasser and the victim, even as they may become less frequent.

Id. at 972.

In this case, the few isolated incidents between LeGrand and Father Nutt certainly make the unwelcome sexual comments and conduct the "salient feature" of their relationship. Father Nutt was not LeGrand's direct supervisor, but he was a member of the Board of Directors of Area Resources for Community and Human Services (ARCHS) and co-chair of the Sustainable Neighborhood Initiative (Initiative). In that sense, he was a "higher official" for purposes of LeGrand's hostile environment claim, given that LeGrand was employed by ARCHS and his direct supervisors were the Initiative Coordinators. As an ARCHS board member, Father Nutt consulted and advised LeGrand's direct supervisors on "neighborhood issues." He was not a member of the Leadership Team or Initiative Personnel Committee that evaluated ARCHS employees' performance, although LeGrand mistakenly believed that Father Nutt was a member of the Leadership Team.[2] At any rate, LeGrand knew that Father Nutt co-chaired the overall Intitiative and LeGrand's job as a neighborhood facilitator including serving three area communities, all of which came within Father Nutt's parish. Petitioner's App. at 2a-3a, 13a-14a.

LeGrand alleged that Father Nutt indicated LeGrand would advance in the company if he watched pornographic movies and masturbated Father Nutt and that rejection of Father Nutt's advances might hurt his career. Petitioner's App. at 3a, 18a. This allegation did not subject ARCHS to strict liability for harassment resulting in a tangible employment action, given that Father Nutt's comments about advancing or hurting LeGrand's career did not result in a tangible job detriment. It was simply a case of "unfulfilled threats." Petitioner's App. at 19a.

The trial court addressed the relationship between LeGrand and Father Nutt, determining that Father Nutt's status as an ARCHS board member and co-chair of the Initiative does not "necessarily

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[2] Contrary to Respondent's assertions, LeGrand did believe Father Nutt had authority to affect his employment. *See* Respondent's Brief at 13. He knew Father Nutt was an ARCHS board member and the overall co-chair of the Initiative. LeGrand mistakenly believed Father Nutt was on the Leadership Team. Petitioner's App. at 2a, 14a.

make him an employer of ARCHS, moreover plaintiff's supervisor." Petitioner's App. at 25a. The Eighth Circuit did not consider Father Nutt's status as a supervisor, co-employee or non-employee. Nor did it analyze whether ARCHS took prompt, corrective action when it learned of LeGrand's complaints. It simply held that the alleged conduct did not rise to the level of actionable hostile work environment sexual harassment. Petitioner's App. at 9a. Absent any indication by the Eighth Circuit to the contrary, it determined that the sexual comments and touching were insufficiently severe to establish a prima facie hostile work environment claim, regardless of whether Father Nutt was a supervisor, co-employee or non-employee.[3] Therefore, its "decision could be read to stand for the proposition that the status of the harasser is irrelevant to the determination of whether the environment is 'actionable.'" *Steck v. Francis,* 365 F. Supp. 2d 951, 966 (N. D. Iowa 2005). Also left unanswered is the question of whether a harasser's apparent authority should be considered when analyzing the severity of the alleged conduct.

III. CONCLUSION

In *LeGrand,* the Eighth Circuit disregarded this Court's sexual harassment jurisprudence, rewrote the "severe" component of this Court's sexual harassment jurisprudence and articulated a new quantitative harassment test in which "[m]ore than a few isolated incidents are required" for any hostile environment claim. Petitioner's App. at 7a. This standard contravenes this Court's precedent and should not be allowed to stand. For all of the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for certiorari.

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[3] Lower courts have recognized employer liability for harassment by nonemployees. *See Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998); Jarman v. City of Northlake, 950 F. Supp. 1375 (N.D. Ill. 1997).

Respectfully submitted,

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